Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1993

Thomas W. Makin, et al.,
Petitioners,

v.

Robert Russell Evans, et al.,
Respondents.

Petition for Review to the

Supreme Court of Oregon

PETITION FOR A WRIT OF CERTIORARI

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19 pp

QUESTION PRESENTED FOR REVIEW

1. In review of the 14th Amendment to the United States Constitution regarding due process and equal protection; Is it reversable error of an Appellate Court to dismiss and then deny reinstatement of an Appeal as a result of the Appellants good faith, but failure to timely fulfill undertaking requirements as a result of that persons late submission of bond funds or security as required by statute due to the Appellants lack of funds?

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

Parties

The Petitioners are Thomas W. Makin, owner and manager of Lostine Satellite Systems, an independent sole proprietorship. Makin is appearing pro se in the interests of both petitioners. Makin is representing his own interests and not those of any other person.

The respondents are Robert R. Evans and the Joseph Eagle Publishing Company, an independent sole proprietorship of Mr. Evans. Also involved here is United States Fidelity and Guarantee Corporation, Mr. Evans insurer.

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Jurisdiction of the Court

The Oregon Court of Appeals issued its Order denying the Petitioners Motion to reinstate appeal on September 10, 1993. The Oregon Supreme Court issued its Order denying Supreme Court Review on November 16, 1993:

No Motion for reconsideration was filed, and no extensions of time were requested;

The United States Constitution, Art. 3, section 2, Clause 2 and 28 U.S.C., section 1257 confer jurisdiction upon the Supreme Court of the United States in this matter.

Constitutional Provisions

U.S. Constitution, Amend. XIV, Section 1

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statement of the Case

This petition is the result of the Petitioners failure to timely post a $500.00 undertaking in the Appeal to the Oregon Court of Appeals after demand by the Respondents as required by Oregon Rules of Appellate Procedure 19.038 and 19.040. The funds were deposited, but the last deposit was made 9 months after initial filing of the Notice of Appeal. After initially dismissing the Appeal due to lack of timely bonding the Court then refused to re-instate it after the funds were on deposit and available to the Respondent; Whereby the petitioner asserts a violation of due process and equal protection constitutional rights:

Case Facts

On August 10, 1990 Appellant-Petitioner Thomas W. Makin brought this action for Libel against respondent Robert R. Evans and his Newspaper, The Joseph Eagle. After lengthy pre-trial litigation and the taking of deposition testimony, defendent Evans wrongly obtained Summary Judgement prior to trial. against Plaintiff Makin on June 24, 1992. Plaintiff Makin later timely Motioned the Wallowa County Circuit Court for (1) Relief from Summary Judgement; (2) Leave to Amend; and (3) Summary Judgement on July 1, 1992 and substantiated the Plaintiffs case by Affidavit containing trained, professional testimony. Defendent Evans Attorneys failed to respond by Affidavit and appear to have defaulted on the evidence;

After hearing, the Circuit Court denyed Plaintiff Makin's Motions by Order dated Aug. 6, 1992. Makin Appealed;

As allowed by Oregon Rules of Appellate Procedure 19.045 (2) Appellant Makin moved for reduction or elimination of the undertaking requirement. on September 30, 1992 for financial reasons due to a poor job and high living expenses. The Circuit Court for Wallowa County denyed this Motion on October 14, 1992. As seen in the September 10, 1993 Court. of Appeals Order Denying Reinstatement, Appellant Makin was unable to fulfill bonding obligations completely until May 12, 1993, about 9 months late regarding statutory requirements.

Argument

There is no constitutional requirement that the Respondent be guaranteed his costs on appeal (see Corpus Juris Secundum, Appeal and Error, Section 502 (b) "Power of the legislature and Constitutionality of Statutes") thereby rendering State undertaking laws as regulatory only and their application

and effect thus subject to Judicial discretion by the Appellate Courts in regard to due process and equal protection rights;

Further, in matters of Habeous Corpus it is well established that indignency is equitable grounds for justifyed, equal treatment regarding due process rights when undertaking requirements are considered, (Daugherty vs Gladden, 257 F2d 9th Circuit, 1958):

On February 23, 1972 the Supreme Court of the United States considered the case of Lindsey vs Normet, 405 US 56, 31 L Ed 2d 36, 92 S Ct 862; which weighed the need for double bonding in a rental dispute; The Court stood by Constitutional Law, Sec. 493, Equal Protection-Appeal;

"When an Appeal is afforded, it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the equal protection clause of the 14th Amendment."

Petitioner Makin has visited and revisited the 14th amendment protections when moving the Oregon Court of Appeals for reinstatement of the Appeal on May 14, 1993;

and again when Petitioning the Oregon Supreme Court for review; whereas both Courts have apparently opted to deny reinstatement due to what appears to be unguided discretion based only apon lapse of time incurred in the case while the petitioner was building up sufficient bonding funds. The petitioner believes that such unguided and uncontrolled discretion regarding due process and equal protection is beyond the intent of the 14th Amendment protections.

Conclusion and Prayer

Petitioner Makin fulfilled undertaking requirements, although untimely. The Petitioner did not challenge the Statute requireing the undertaking to be filed, but only tried to comply with it. Irregardless of the petitioners good intentions, the Oregon Court of Appeals dismissed the action, and chose not to allow due process. This decision was upheld by the Oregon Supreme Court:

WHEREFORE, Petitioners Thomas W. Makin and his sole proprietorship, Lostine Satellite Systems respectfully request and pray this Honorable Court to (1) Grant this Petition for Writ of Certiorari and reverse the September 10, 1993 Order denying Appeal reinstatement by the Oregon Court of Appeals; and (2) Remand this case back to the Oregon Court of Appeals for further litigation.

Respectfully Submitted;

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Thomas W. Makin
P.O. Box 148
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September 30, 1992

Honorable Judge Eric Valentine
Wallowa County Circuit Court
Wallowa County Courthouse
Enterprise, Oregon
97828

RE Makin vs Evans
Cir. Ct. #90-08-9996
Crt of Appeals
CA A76366

Your Honor:

By verbal stipulation between myself and Cathy Smith of Mr. Hiefields office, we continued the time necessary for me to file the undertaking bond of $500.00 in this matter until today, Sept. 30, 1992, thus waiving the appellate rules.

The problem is that sales at my job have only netted me $175.00 per week this month and I don't have the money. This could render an unfair dismissal of my appeal.

Would you please reduce the bond to $200.00, due by the end of October as per your authority in 19.045 (2) if not relieve

me of the cost totally. I don't know for sure if I will have the money but would act in good faith if I do. We are all located here in Portland and Mr. Hiefield could collect his fees if he prevails through normal channels anyway.

I'm sorry but I'm strapped and I don't want this small matter to interfer with proper adjudication of this case.

Sincerly yours

s/ Thomas W. Makin

cc: Mark Hiefield

Motion Denied

s/ Eric W. Valentine
Circuit Judge pro tem
Oct. 14, 1992

THOMAS W. MAKIN, et al.	*	In the
	*	Court of
	*	Appeals
V	*	of Oregon
	*	Appeal Docket No. CA A76366
ROBERT R. EVANS, et al	*	
	*	ORDER DENYING MOTION TO RE-INSTATE APPEAL

Appellant Thomas W. Makin has moved for re-instatement of this appeal. The circumstances of this case are:

The notice of appeal was filed on Aug. 26, 1992, from a judgement entered on Aug. 6, 1992. Appellant did not file an undertaking at that time. After being warned that respondents would move to dismiss the Appeal for failure to file an undertaking, in Sept. 1992, appellant represented that he would deposit $250.00 at the beginning of the month and $250.00 by the end of the month, in lieu of filing an undertaking.

Appellant did not make either deposit, but, rather, moved the trial court for reduction or elimination of the undertaking. The trial court denyed that Motion.

In October 1992, respondents moved to dismiss the appeal for failure to file an undertaking. Appellant deposited $50.00 cash and moved for a continuance, seeking more time to make cash deposits in lieu of an undertaking. By January 1993, appellant had not deposited any additional funds. By Order dated January 29, 1993, this Appeal was dismissed.

In February 1993, appellant moved for reconsideration of the Order of dismissal and for an additional 90 days to file an undertaking. Unbeknownst to the court, on April 15, 1993, appellant deposited $225.00 with the trial court toward the undertaking. By order dated April 27, 1993, the court denied appellant's motion for reconsideration.

On May 12, 1993, appellant deposited an additional $225.00 with the trial court and, on May 14, 1993, moved for re-instatement of the appeal.

The Court recognizes appellant's efforts to deposit cash in lieu of an undertaking. However, considering the fact that the Notice of Appeal was filed on Aug. 26, 1992, the first significant deposit of funds ($250.00 on April 15, 1993) was too little too late. The motion to re-instate is denied.

s/ William Richardson
Chief Judge
Sept. 10, 1993

THOMAS W. MAKIN, et al,	*	In the
	*	Supreme Court
	*	of Oregon
V	*	CA A76366 SC S40659
	*	
ROBERT R. EVANS, et al,	*	ORDER DENYING REVIEW
	*	

The Court has considered the petition for review and ORDERS that it be denied.

DATE: November 16, 1993

s/ Wallace P. Carson, Jr.
CHIEF JUSTICE